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No. 28

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,
Petitioner,

vs.

GIACOMO VENTRESCA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Indictments

The defendant Ventresca was indicted under Indictment No. 62-257-C returned and filed on August 20, 1962, (pages 16-20 of Appellant's Rec.App. before C.A.). The indictment charged him with certain violations of the Internal Revenue Code as follows: Count 1, 26 U.S.C. 5171(a) failure to register a still; Count 2, 26 U.S.C. 5173(a) failure to file a bond; Count 3, 26 U.S.C. 5602, intent to defraud United States of tax; Count 4, 26 U.S.C. 5179(a) possession of an unregistered still; Count 5, 26 U.S.C. 522(a)(1) possession of mash in unbonded premises; Count 6, 26 U.S.C. 5205(a)(2) possession of

distilled spirits in unstamped containers; Count 7, 26 U.S.C. 5686, possession of liquor and property with intention to violate Internal Revenue Code; Count 8, 26 U.S.C. 5180(a) and 26 U.S.C. 5681, failure to post a sign.

In addition to the above, the defendant was charged along with others (Count 11) with conspiracy to commit said violations. This conspiracy count was subsequently dismissed on motion of the Government and the defendant was re-indicted for the same alleged conspiracies under indictment No. 62-290-C returned by the Grand Jury on September 7, 1962 (pp. 20-23 of Appellant's Rec.App. before C.A.)

The Search and Seizure

Prior to his indictment, certain premises at 148½ Coburn Avenue, Worcester occupied by the defendant and his family were searched under the ostensible authority of a federal search warrant.

A written application for the search warrant had been made on August 31, 1961 by one Walter A. Mazaka, Investigator of the Alcohol and Tobacco Tax Division, Internal Revenue Service, U.S. Treasury Department, to the Honorable W. Arthur Garrity, United States Commissioner, District of Massachusetts, Worcester, Massachusetts, (R. 2). Accompanying said application was a written "Affidavit for Search Warrant" signed by the said Mazaka and sworn to in the presence of said Commissioner on August 31, 1961, (R. 4-9)

Following receipt of said application and affidavit the said Commissioner issued a search warrant dated August 31, 1961 and identified as Commissioner's Docket No. 1, Case No. 186, (R. 8, 9). On September 1, 1961, the said Mazaka, together with others acting under his authority and control, searched the subject premises, seized certain

articles situated therein, and seized and destroyed others. A return of the warrant was then executed and filed by Mazaka in which was included an inventory of the items seized and of the items seized and destroyed.

The Motion to Suppress

Following the two indictments the defendant duly filed Motions for the Return of Seized Property and for the Suppression of Evidence. Companion motions were filed in the case of each indictment, (R. 10-15)

The Preliminary Hearing

Defendant's various preliminary motions, together with his motions to suppress evidence were heard on October 10, 1962 by the U. S. District Court, Caffrey, D. J. sitting, following which the Court filed a Memorandum and Order in each case under date of December 31, 1962, (R. 15-19)

The Jury Trial

The defendant having pleaded 'Not Guilty' the case was tried before United States District Judge Andrew A. Caffrey and a Jury resulting in a verdict of guilty on all counts of each indictment.

At the commencement of the trial, after the jury was empanelled and after the government's attorney made his opening statement, but before any testimony was introduced, the defendant Ventresca orally renewed his motion for the return of seized evidence and to suppress its use as evidence in the same form of the written motion filed earlier which the Court denied by Memorandum and Order on December 31, 1962. The motion as renewed was denied and the defendant duly objected, (R. 20)

During the course of the trial and as the government sought to introduce testimony or exhibits as to the results of the search of the defendant's premises at 148½ Co-

burn Avenue, Worcester, the defendant made a general objection which the Court accepted (R.App. pp. 38-39).

At the close of the evidence, after both parties had rested, and before arguments of counsel, the defendant Ventresca duly filed a Motion for Judgment of Acquittal in each case. The motions were denied and the defendant duly objected, (R. 21-24)

Judgment and Notice of Appeal

Following the jury's verdicts of guilty on all counts of both indictments, the Court entered judgments of guilty in each case on April 15, 1963 and imposed sentence. (R. 24-27). Following entry of the judgments, the defendant duly filed Notices of Appeal in each case.

The Court of Appeals (1st Circuit)

Following a hearing before the Court of Appeals for the First Circuit, that Court (Hartigan, J.) entered an opinion on November 26, 1963 vacating the judgment of the district court, setting aside the verdict, and remanding the case for a new trial consistent with the circuit court's opinion. Judge Woodbury filed a dissenting opinion and Judge Aldrich in a concurring opinion rebutted the dissent of Judge Woodbury. (R. 28-38). The opinion of the circuit court, including the dissent and the concurring opinion are reported in 324 F(2) 864.

The Petition for Writ of Certiorari

The Petition for Writ of Certiorari was filed on January 23, 1964 and was granted on June 22, 1964 (R. 40).

APPLICABLE STATUTES AND RULES

UNITED STATES CONSTITUTION, FOURTH AMENDMENT

> "The right of the people to be secure in their persons, houses, papers, and effects against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 7

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . ."

RULE 41

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property.

(1) stolen or embezzled in violation of the laws of the United States; or

(2) designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., s. 957.

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he

shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

QUESTIONS PRESENTED

Both the appeal to the Court of Appeals and this proceeding before the Supreme Court of the United States question whether the U. S. District Court was right or wrong in declining to suppress evidence seized in a search of the defendant Ventresca's premises on September 1, 1961. More specifically, the action of the District Court under challenge is the court's denial of defendant's pretrial motions to suppress such evidence, its denial of his renewal of such motions at the outset of trial, its continued denial of similar such motions during trial as the evidence itself was presented, and its denial of defendant's motions for acquittal insofar as based on the alleged inadmissibility of such evidence.

This same issue, as now raised on petition for Writ of Certiorari, questions the correctness of the decision of the Court of Appeals in reversing the action of the District Court.

In reversing the District Court, the Court of Appeals held that the written affidavit on which the search warrant was based was inadequate, and that, for that reason, the warrant itself was not issued on probable cause within the meaning of the Fourth Amendment.

It has been and is the defendant's contention that the affidavit was not an affidavit in the true sense of the word; that it failed to show that the affiant or even the persons who reported information to him had personal knowledge of any of the facts germane to a finding of probable cause; that it failed to disclose who could be held to account for the truth of the allegations recited therein, whether the affiant or some other party; that on its face it can only be recognized as a 'hearsay' affidavit; that it contained nothing within itself to meet the substantiation test of the *Jones* case (362 U.S. 257); and that it therefore did not satisfy the requirements of either Rule 41(c) of the Federal Rules of Criminal Procedure or the Fourth Amendment.

The fundamental question therefore is the sufficiency of the affidavit upon which the search warrant issued.

SUMMARY OF ARGUMENT

Since the affidavit failed to show just which of its facts were within the personal knowledge of the affiant, although he claimed some of them were, the affidavit can only be handled as complete hearsay.

As a hearsay affidavit, it should be disqualified for want of substantiation crediting the hearsay. This was the yardstick laid down by this Court in the *Jones* case (362 U.S. 257) decided in 1960.

Not only was there no identification of those who allegedly supplied information to the affiant; the affidavit did not even show that these informants had direct knowledge themselves, or that in transmitting their re-

ports they had direct and personal contact with the affiant.

Those cases which uphold affidavits based wholly or partly on hearsay usually contain one or more features lending credibility to the hearsay which this affidavit did not have.

Where affidavits do not clearly show that the affiant had personal knowledge or substantiation for reported hearsay, magistrates and courts should not infer as the government would have them do in this case, that he did. The right of a private citizen to be secure in the privacy of his home extends with equal force to defendants and those under suspicion as well as to those who are innocent; and the safeguards of the Fourth Amendment should be administered carefully and cautiously with these rights in mind and not, as the government would employ in this case, loosely and casually lest police officials be discouraged and offenders go unapprehended.

ARGUMENT

I. THE SEARCH WARRANT WAS NOT BASED ON A PROPER AFFIDAVIT.

A. The Affidavit was Based on Unsubstantiated Hearsay.

1. *The Phrasing of the Affidavit.*

The affidavit (R. 4-8) was made by one Walter A. Mazaka, concededly an employee of the Alcohol and Tobacco Tax Division of the U. S. Department of Internal Revenue.

In his introductory sentence on the face of the printed form of affidavit, the affiant elected to use the printed words "has reason to believe" rather than the words "is

positive", the latter being deleted. Attached to the printed form of affidavit was a lengthy recitation of fact on which the belief of the affiant is said to have been based.

The first and last paragraphs of the attached recitation of facts are the ones to be noted. They read as follows:

FIRST PARAGRAPH

"Based upon *observations* made by me, and based upon *information received officially* from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and *reports orally* made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made." (underscoring supplied) (R. 5)

(Eleven paragraphs of facts inserted here without any showing as to who made the observations).

LAST PARAGRAPH

"The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation." (R. 8).

2. *The Rule of the 'Jones' Case*

(a) A hearsay affidavit must have some substantiation.

It was held in *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725 (1960) that an affidavit based wholly or partly on hearsay is not for that reason disqualified provided there is "a substantial basis for crediting the hearsay". The Court said (p. 269):

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, *so long as a substantial basis for crediting the hearsay is presented.*" (italics supplied).

The rule was recently reaffirmed in *Chin Kay* v. *United States*, 311 F(2) 317 (C.A. 9th, 1962):

> "Hearsay evidence may provide the probable cause necessary for either an arrest without a warrant, or for the issuance of an arrest warrant or a search warrant, *if a substantial basis for crediting the hearsay evidence is presented.*" (italics supplied).

But the rule of the *Jones case* has not been viewed as an unqualified acceptance of hearsay affidavits. Something more must be shown. In *United States* v. *Ramirez*, 279 F.(2) 712.715 (C.A. 2nd. 1960) appears the following:

> "*Jones* v. *U.S.* . . . has now established that an affidavit consisting primarily of hearsay information may be sufficient to support the issuance of a search warrant. However, the requirement that the affiant shall have personal knowledge still exists, for under Jones, the affiant must not only believe the hearsay report but in all likelihood the affiant must further demonstrate that his informant has established a reputation for reliability so as to be worthy of belief. *In addition Jones may require that the affidavit include some factual information independently corrobative of the hearsay report*". (italics supplied)

(b) The 'substantial basis' must be contained in the affidavit.

Since a search warrant can issue only on a written affidavit (Rule 41c), the court must confine its attention

to the affidavit and determine if the facts disclosed therein constitute probable cause. A determination of probable cause on facts that were in existence but which were not in the affidavit does not save the warrant.

In *United States* v. *Casino*, 286 F. 976 (S.D. N.Y. 1923) the Court said:

> ". . . it is not material that the other evidence is absent, which was before the commissioner and which may have induced him to deny quashal of the warrant. While under section 16 he must decide after hearing whether on all the facts there were reasonable grounds for the warrant, that does not dispense with the necessity for allegations in the affidavits themselves, which, if true, show a self subsisting ground for the issuance of the warrant. It is not enough that on the hearing other grounds may appear even though not upon evidence extracted by the search itself. The showing for the issue must be enough to stand alone, and must be proved upon the hearing, if challenged. It will not do to abandon the 'reasonable cause' first asserted, and support the search upon a new charge. In this respect the affidavits are like pleadings."

On this point, the Court of Appeals in the present case had this to say (Judge Aldrich's concurring opinion; R. 36):

> "The government's obligation under the Fourth Amendment to justify the issuance of a warrant is far from a 'pro forma' matter. *Marron* v. *United States*, 1927, 275 U.S. 192, 195. This is illustrated by the undisputed rule that deficiencies in its prima facie showing are not remedied by the circumstance that subsequent events prove it was right after all. *Byars* v. *United States*, 1927, 273 U.S. 28."

See also:

> *Giordenello* v. *United States*, 357 U.S. 480. 78 S.Ct. 1245 (1958)

Baysden v. *United States*, 271 F(2) 325 (4th, 1959)
Tripodi v. *Morgenthau*, 213 F.Supp. 735 (1962)
United States v. *Walters*, 193 F.Supp. 788 (D.C. Ark. 1961)
United States v. *Interbartolo*, 192 F.Supp. 587 (D.Ct. Mass. 1961)
United States v. *Nichols*, 89 F. Supp. 953 (W.D. Ark. 1950)

3. *The Mazaka Affidavit Failed to Meet the Test of the 'Jones' Case*

(a) It can only be considered as based wholly on hearsay.

(1) *Analysis of the Affidavit.*

Rule 41(c) of the Federal Rules of Criminal Procedure uses the word "affidavit". It is presumed to have used the word in its usual and proper sense. The word is the equivalent of the perfect tense, third person singular, of the Latin verb, "affido", meaning to plight one's faith. Translated it means, he has sworn to the truth, or he has made oath.

By its very definition an affidavit is a statement of fact by a person under oath as to matters of personal knowledge or as to things known to be true. Otherwise, it is difficult to see how an oath can confidently be taken.

In this case the alleged affidavit falls short of what an affidavit ought to be.

In his first paragraph the affiant apparently swears that some of his information came from his own observations, that some was received officially from other investigators, and that some was based on oral reports. He fails to show which facts were personally observed and which were hearsay. The lengthy recitation of facts is without any specific identification or definition in this regard. It could well be that none of the essential

facts set forth in the affidavit were actually witnessed or established by the affiant. It could well be that his personal "observations" were inconsequential on the matter of establishing probable cause. It could well be that the only fact known to the affiant was the defendant's address.

By stating in one breath that the facts in the affidavit stem from personal observation, from official information, and from oral reports, the affiant muddied the waters and made impossible, except by conjecture, any separation as to what facts were based on knowledge and what were hearsay. The commissioner is not entitled to guess which part of the affidavit is the personal knowledge of the affiant. He can only handle it as total hearsay.

The second quoted paragraph, like the first, eliminates any possibility of separating fact from hearsay. It contains an intrinsic contradiction. Literally read, it states that the information "is based upon personal knowledge and information . . . obtained from investigators", etc. etc. But knowledge (and/or information) obtained from others is not "personal" knowledge under laws of judicial evidence. (*United States* v. *Greenberg*, 320 F (2) 467(C.A.9th,1963). The affiant did not use the disjunctive as he did in the first quoted paragraph and say his information was based upon personal knowledge, and upon information obtained from others. He leaves room for a construction that all his knowledge and information came from others. Hence the second quoted paragraph, even more than the first, shows that, as to the defendant, the affidavit must be regarded total hearsay.

Confronted with this situation, the court of appeals said:

"The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon 'personal knowledge and information,' it is stated that such 'personal knowledge and information' was obtained from other Investigators."

"Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay". (R. 33)

(2) *The Government has conceded this point.*

In its brief the Government has apparently conceded this point. Quoting from pages 12 and 13 of the brief:

"we agree that since the affidavit did not make clear which of the relevant observations Mazaka made personally and which were reported to him by others, it was appropriate to consider whether there was substantial basis for crediting the reports of others upon which Mazaka's affidavit may have essentially been based".

(3) *Mere assertion of personal knowledge adds nothing.*

The mere fact that an affiant may say quite gratuitously, that the information in his affidavit is a matter of personal knowledge, or is a fact, doesn't make it so in the absence of facts to support such a statement. An opinion or a conclusion will not suffice.

In *United States* v. *Nichols*, 89 F.Supp. 953 (W.D. Ark. 1950) an affidavit based on hearsay was not strengthened by a statement that the affiant "was sure".

See also *United States* v. *Interbartolo*, 192 F.Supp. 587 (D.Ct., Mass. 1961) where it made no difference that the affiant said the statements were made on his personal knowledge.

See also *United States* v. *Greenberg*, 320 F(2) 467 (C.A. 9th, 1963) involving an affidavit containing only hearsay; and where the acquittal was confirmed, although the affiant claimed he had personal knowledge.

(b) Neither the origins nor the reliability of the hearsay were substantiated.

(1) There was no showing that the reports given to the affiant were matters of personal knowledge to the persons so reporting.

Not only were the so-called government investigators nameless and faceless, the affidavit gave no assurance that the matters reported to the affiant by the so-called investigators were observed by them.

The first paragraph said that the investigators gave oral reports to the affiant "describing the results of their observations and investigation". At the most we have an affidavit by the affiant that he heard something from investigators who themselves had come upon the information in the course of an investigation. As to this, the court of appeals said:

> "Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term 'investigation' are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants,

> the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." (R. 35)

A similar holding on a somewhat similar set of facts is found in *Dibella* v. *United States*, 284 F. 2d 897 (C.A. 2d. 1960) (appeal later dismissed on procedural grounds, 369 U.S. 121). It was held that an arrest warrant had issued illegally on the basis of an insufficient complaint (seizure of goods sustained on other grounds). The complaint contained language very much like the affidavit in the instant case, to wit:

> "That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samual Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

In striking down the warrant for arrest, the Court said (at p. 900):

> "It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been committed was grounded on his 'personal observations in this case, the statements of Samuel Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics' but what other sources could there possibly be? Such a shotgun, all encompassing, enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless other witnesses or the unidentified reports and records. The complaint is no better than that in *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245 (1958) and the warrant is invalid for the same reasons."

In *Aguilar* v. *State of Texas* 378 U.S. 108, 84 S.Ct. 1509 (1964) the court, in holding that an affidavit failed to pass muster, stated as follows:

> "The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an "affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge'. For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause'. He necessarily accepted 'without question' the informant's 'suspicion', 'belief' or 'mere conclusion'."

In *Tripodi* v. *Morgenthau*, 213 F. Supp. 735 (S.D. N.Y., 1962), the Court struck down a search warrant by reason of an insufficient affidavit. The affiant stated that "the facts tending to establish the grounds for issuance of the warrant were oral statements made to your deponent and investigations made by your deponent during the course of his official duties including personal observations of gambling paraphernalia in the premises."

In *Masiello* v. *United States*, 304 F(2) 399 (D.C. 1962) the Court wrestled with the problem of a joint affidavit and with a charge that it was impossible to tell just which observations were made or were not made by the affiants individually. Although the court sustained the affidavit on the grounds that one of the affiants saw all, it recognized a serious problem in the use of a joint affidavit unless it is made clear that either one or both of the affiants were responsible for the entire statement.

Similarly, in *United States* v. *Castle*, 213 F. Supp. 56, 57 (D.Ct. D.C. 1962) a joint affidavit was sustained because it specified "with complete clarity which items of information were known by each of the affiants".

But in the instant case we have less than a joint affidavit; we have joint hearsay reported to one person, Mazaka, who then consolidated all reports in one affidavit of his own. The anomaly lies in the fact that if all the investigators reporting to Mazaka had signed a joint affidavit, either with or without Mazaka, it would be in trouble under the doctrines of the *Tripodi* and *Masiello* cases, *supra*. But where Mazaka signed it alone, the Government contends it is valid. Yet there seems no reason to give it greater credit where only one signs it rather than all, where the one who signed it does not declare himself responsible for all of the facts.

In *United States* v. *Pearce*, 275 F.(2) 318 (C.A. 7th 1960), it was held that an affidavit based on hearsay relayed from one federal agent to another did not qualify. The affiant, an FBI agent, had received his information from his superior, who in turn had received it from an FBI agent in Seattle, who in turn had received it from a reliable informer. The Court pointed out that the affiant was therefore in no position to swear he had received his information from "a source which in the past has proved reliable".

(2) Nor were the persons who made the reports to the affiant named, identified, or otherwise established as reliable.

Assuming for the sake of argument that there was no hearsay upon hearsay and that those who reported the facts to the affiant observed them first hand, the affiant still did not identify the sources of his information other than to say it came from investigators. This deficiency is not always fatal, as in cases where there is other substantiation for crediting the hearsay; but where there is

nothing but the hearsay as defendant contends is the case here, it becomes necessary to know something about the person or persons on whom the affiant has relied.

Although he says he received his information from investigators attached to the Alcohol and Tobacco Tax Division, he does not identify them by name or other description. He assumes a judicial finding as to their reliability without judicial strain. Nothing is said as to who they were, whether full time or 'ad hoc' employees, whether new or old in the service, whether well known to the affiant or not, whether attached to the same division as the affiant or not, or whether found to be reliable in the past or not. His form of affidavit necessitates a judicial determination that the hearsay of these individuals owes its substantial basis for credibility to the mere fact that these people were employees of the government assigned in this case, to the same type of work as is the affiant.

In *Schoeneman* v. *United States*, 317 F(2) 173 (D.C. 1963) the Court said:

> "Agent Richardson's affidavit before the commissioner was predicated on still another affidavit before another agent. In establishing probable cause, of course, the commissioner may rely upon hearsay information 'so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' *Jones* v. *United States*, supra, 362 U.S. at 269, 80 S.Ct. at 735. But here the corroboration only attempts to show that the informant is reliable. Briefiy, it indicates that the undisclosed informant is a former Government employee, that he is now a business executive, that he made his statement under oath, and that he did have a meeting with Markham. The statement in the affidavit that he 'is believed to be reliable' is ambiguous, apparently meaning that the FBI as an entity believed him reliable, but not committing the affiant."

In *Baysden* v. *United States*, 271 F.(2d) 325 (C.A. 4th 1959) an affidavit supporting a search warrant said the officers had been informed that a quantity of counterfeit money was present in the property sought to be searched. The affidavit was held insufficient since it did not identify the informant from whom the information had been received.

In *United States* v. *Betz*, 205 F.Supp. 927 (E.D. Mich. S.D. 1962) a search warrant was struck down for having been issued on an insufficient affidavit. Although the affiant claimed to have confidential information, considered reliable, that the defendant was engaged in criminal activity in his home, the affidavit was held devoid of "substantial basis for crediting the hearsay."

In *United States* v. *Gebell*, 209 F.Supp. 11 (E.D. Mich. 1962) the court struck down a search warrant based on an affidavit it felt was insufficient. The affiant said his information was based upon confidential information considered reliable that a handbook operation was being conducted on the premises to be searched. The Court held this was insufficient and that the defect was not cured by other facts recited in subsequent paragraphs of the affidavit.

See also:

Wong Sun v. *United States*, 371 U.S. 471, 83 S.Ct. 407, pp. 479-482

Castillon v. *United States*, 298 F(2) 256 (C.A.9th, 1962)

United States v. *Elliot*, 210 F. Supp. 360 (D.Ct. Mass. 1962, Julian, J.)

United States v. *O'Donnell*, 209 F. Supp. 332 (Maine S.D. 1962)

United States v. *Reynolds*, 111 F. Supp. 589 (D.C. 1953)

(3) Nor was there any showing that the affiant had a direct and personal contact with his reporters or informers.

Mazaka's affidavit does not show that all the information contained in the affidavit was reported directly and personally to him.

In his first paragraph he said his affidavit was based upon "information received officially from other investigators" and "reports orally made to me". The oral reports apparently do not cover the entire affidavit. What is to be concluded from the phrase "information received officially" remains to be seen. It could be anything. It does not necessarily mean a direct report from an investigator to the affiant of what the investigator personally discovered, but could refer as well to the physical transmission of an office file, or to the routine transmission of information through official channels.

Mazaka's affidavit of fact is a useless affidavit at best when he confesses it is based on oral reports of the results of investigations carried on by other people. For all that appears, he could well have framed it from the contents of his office files. He should not presume a vote of confidence in himself from the magistrate before whom he makes his affidavit. As Justice Douglas said in his dissent in the *Jones* case, *supra*, "The duty of the magistrate is non-delegable".

B. Recapitulation

This portion of defendant's brief can be stated in summary form in the language of the Court of Appeals (R.36):

> "If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their

> corroboration. And [fol. 128] where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient."

The petitioner's brief (p. 2) oversimplifies the issue when it states that the Court of Appeals was troubled by only two things, (1) whether the affidavit was a hearsay affidavit and (2) if so, whether the information was "gathered entirely by unreliable informants".

A reading of the decision clearly shows that its concern was broader than this; that not only was it concerned with whether the affidavit was bottomed on mere hearsay or whether the government investigators were reliable—it was also concerned with whether the information was the personal knowledge of the investigators. Repeating again the language of the court below:

> "Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term "investigation" are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." (R. 35)

The Court then concluded:

> "Because we are unable to determine from Mazaka's affidavit which of the statements therein are based on his own personal knowledge, which are the result of hearsay, and whether such hearsay is di-

rect or not, we hold that the affidavit is insufficient to support the issuance of a search warrant and the search and seizure made pursuant thereto were unlawful and in violation of the constitutional rights of the defendant." (R. 36)

C. Other Hearsay Affidavits Distinguished.

Hearsay affidavits that pass the test are customarily buttressed by one or more elements found lacking in the instant case.

In the *Jones* case itself (362 U.S. 257) the source of the hearsay had direct knowledge himself (not mere suspicion or circumstantial evidence) of the possession of contraband articles. Secondly, the source had given reliable information to the affiant in the past. Thirdly, the defendants 'to-be' were familiar to the Government agents, had admitted to them the use of narcotics, and displayed needle marks. The Court said:

> "Thus we may assume that Didone . . . (the affiant) . . . had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the claimant's story." (italics supplied)

The Court then went on to recite the further elements listed above, the sum total of which added up to substantial basis for crediting the hearsay.

Contrasting the *Jones* case item by item with the present case, the informants, whoever they were, had not been in the defendant's premises; they had not seen a still or illegal alcohol; they were not reported as rendering reliable information in the past; and the defendant himself was not identified as being familiar to government agents, or as having admitted contact with illegal alcohol in the past. The affidavit was total hearsay, and

contained nothing of a direct nature to substantiate the hearsay.

In a footnote numbered 6 on page 18 of its brief, the Government says that "if an affidavit contains *any* facts sufficient to establish probable cause, the warrant will be upheld" (underscoring supplied) and cites in support of this proposition the *Chin Kay* and *Clay* cases, *infra*. A reading of these cases shows they hold no such thing.

The question, which to some extent may be a matter of degree, is discussed more fully in part III D of this brief. In short, it was the opinion of the Court below that something of substance must be set forth in an affidavit if it is to qualify; and that it ought not to pass if it contains only a trace or a jot of substantial fact imbedded in a swamp of otherwise inconsequential elements.

Turning now to the authorities cited by the Government, in *Chin Kay* v. *United States*, 311 F(2) 317 (C.A. 9th, 1963) the court pointed out (on p. 320) that the hearsay contained in the affidavit "together with Agent Feldman's . . . (and Feldman was the affiant) . . . personal knowledge recited in the last paragraph of the affidavit that the appellant, Chin Kay, was President of the Tong, and had admitted to Feldman that he had a prior conviction under the narcotic laws, would furnish sufficient probable cause . . ."; and in the very next sentence the court referred to them as "essential allegations", not just "any" allegations as the Government's brief would suggest.

The case of *Clay* v. *United States*, 246 F(2) 298 (C.A. 5th 1957) is hardly an authority for the sweeping contention of the Government that any fact, even a morsel, should sustain an affidavit; for that case merely held that a Commissioner was justified in relying on three affidavits that were sworn to before him and that he could well ignore a fourth affidavit improperly sworn to before another agent of the internal revenue service.

In *United States* v. *Woodson*, 303 F(2) 49 (C.A. 6th 1962) cited on p. 17 of Government's brief, the hearsay affidavit was supported by four other independent affidavits of the investigating officers themselves. If this had been done by Mazaka, either by spelling out what each of his investigators did so that a magistrate could exercise independent judgment on the issue of probable cause, or by having them submit individual affidavits, the *Woodson* case would control.

The affidavit in the instant case is as significant for what it did not say as for what it did say. In many cases where hearsay affidavits are sustained on the basis of other substantiation, there is a direct indication that the defendant had been seen elsewhere with contraband articles in his possession, or that he had been seen in places where such articles are known to be, or that he had been seen in association with other parties known to be trafficking in such articles, or that he had been convicted of a similar offense in the past. The instant affidavit contained nothing along these lines, either as direct knowledge or hearsay.

II. CONSIDERATION OF GOVERNMENT'S ARGUMENTS

A. Rebuttal to Government's Summary of Argument. (Brief for the U.S. pp. 7-9)

The Government attorneys have apparently summarized their argument in that portion of their brief entitled "Summary of Argument" appearing on pages 7 and 8, and in the first paragraph of their "Argument" as appearing on pages 8 and 9. In short, their summation appears to begin in the middle of page 7 and run through to the end of page 9 irrespective of the captions inserted.

The summary proposes first that the affidavit was interpreted wholly against the purposes of the document

much as pleadings were construed against the pleader at common law (pp. 7, 8); secondly, that a strict construction of written affidavits would encourage police to act without a warrant in border-line situations rather than apply for a warrant (p. 8) and thirdly, that although the affidavit disclosed "a fully responsible police investigation", the court of appeals turned it down for failure to "negate the possibility" of the information having originated from unreliable sources (pp. 8, 9).

In short reply, the defendant contends that a careful examination of an affidavit or a literal application of its terms should not be casually branded an interpretation "against the purposes of the document". If this were true, then a careless reading would be consistent with its purposes. Secondly, defendant cannot agree that affidavits should be loosely screened lest police resort to action without warrants. More of this later. And thirdly, defendant points out that the government begs the question when it says the affidavit disclosed a fully responsible police investigation, but was rejected because it did not negate the possibility of an unreliable source. The problem lay not in what the affidavit failed to negate, but in what it failed to state. It would serve no purpose to conduct a fully responsible investigation and then ignore the requirement of the Fourth Amendment and Rule 41 that someone must set forth the facts under oath.

B. Rebuttal to Part I of Government's Brief (pp. 10-18)

Item I(1) of the Government's Brief (p. 10) argues that the facts set forth in the affidavit, if true, establish probable cause. The important word is "if". The Court of Appeals was concerned not with the issue of probable cause on the facts alleged, but with whether the affidavit qualified in the first instance.

Item I(2) of the Government's Brief (pp. 11, 12) complains that the Court of Appeals thought the entire affidavit was hearsay, but that since some of it was the personal knowledge of the affiant the Court was plainly wrong. The government has missed the point. The Court of Appeals well knew that the affiant knew some of the facts, but just which facts the affiant knew the Court could not tell. For that reason the Court had to treat the entire affidavit as hearsay; it did not say it was all hearsay. Secondly, the inference that it was all hearsay was with reference to the "essential facts" (R. 33) only. If, for example, the only facts known to the affiant were of no significance on the issue of probable cause, then as to the essential facts "the entire affidavit was based on hearsay".

In Item I(3) of its Brief (p. 12-18) the Government discusses the issue of "substantial basis for crediting the hearsay". First it argues that some of the information (although it doesn't know just which) was within the personal knowledge of the affiant (pp. 13-14) and that this should furnish a substantial basis for the hearsay furnished by others. Secondly, the government says that insofar as the information came from other government investigators, there is no need to name or identify them. (pp. 14-15). With reference to these two points defendant contends that the fact the affiant had personal knowledge of something, where we don't know what that something was, is hardly a basis for substantiating hearsay; and secondly, that the fact the investigators were not named, although it doesn't necessarily defeat an affidavit, doesn't help to substantiate one either.

Thirdly, the government argues that the observations recounted in the affidavit were so "detailed" and were of such a nature that (p. 16) they must be regarded as having been made by government investigators and therefore be reliable and true. This is a novel proposition since

it would dispense with the need of verfication in any case where the yarn appears well spun. It would suggest that the truth of a set of facts depends upon how true or reliable they appear to be, and that if they clearly appear to be true, then they must be true. In short it could mean that an affiant with the best imagination would have the best chance of getting his story accepted as true.

The smell of mash

Lastly, the government argues that adequate substantiation is to be found in the fact that some government investigators smelled mash in the vicinity of the defendant's property. In reply to this, defendant points out two things; one, the assertions as to investigators smelling mash were themselves hearsay, and secondly these assertions constituted but a minor part or small fraction of an otherwise deficient affidavit. The significance of these two arguments will be developed below.

First, we must remember that the entire affidavit is hearsay and that all of its parts are in need of substantiation or lateral support, including the allegations of odor. Surely, these hearsay allegations as to odor can't substantiate themselves or act as their own support. This is not a case where the one who smelled the mash is also the affiant and the one who took the oath. In this respect, this case differs from the *Monette* and *Johnson* cases, *infra*.

In *Monette* v. *United States*, 299 F(2) 847 (C.A. 5th, 1962) the affiant (Norman R. Hilledge) stated that he was "an enforcement agent with the Florida State Beverage Department" and that he "distinctly smelled the odor of fermenting mash emanating from the premises". (Affidavit set out in footnote #3 of decision on p. 849). In other words, the person alleged to have smelled the odor was identified as the affiant.

In *Johnson* v. *United States*, 333 U.S. 10 68 S.Ct. 367 (1948) a search of premises was held invalid for failure of the officers to first obtain a search warrant. The Court did hold with certain qualifications, that mere evidence of odors would be sufficient to justify issuance of a search warrant.

> "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant."

But this of course did not pass upon the question of a hearsay affidavit.

Secondly, we should hopefully recognize and concede that if a hearsay affidavit is to be approved only where some substantiation for crediting the hearsay is presented, that necessary element or prop should be more than a scintilla.

Given an affidavit which fails to satisfy the fundamental requirements of the Fourth Amendment when viewed as a whole, it would be a disservice to the purpose of the Amendment to knit-pick through its contents in search of an iota or two which might conceivably sustain it.

This was, in essence, a focal point of difference in the majority and minority decisions below. Judges Hartigan and Aldrich felt that the affidavit should be viewed as a whole and that it should rise or fall depending upon whether, as a single instrument, it satisfies the rule. The dissent below and the government in its brief have taken the view that it is unfair or unreasonable to read an affidavit as a whole; rather that it should be approved if any of its fractions might qualify as though standing alone, notwithstanding any impression to the contrary

when the affidavit is read in its entirety. In a word, they contend that an entire affidavit should be regarded as strong as its strongest link, not as weak as its weakest link.

Would it not be preferable for the Government to face the problem with some appreciation of the purposes of these affidavits and meet its responsibility head on. In *United States* v. *Sims*, 201 F. Supp. 405 (M.D. Tenn. 1962) the Court deplored the fact that the government produced an affidavit from an officer who was assisting another in watching a house, but did not produce an affidavit from the one he was assisting. The Court said:

> "If the government should fail to produce an important witness available to it in a full adversary proceeding, a presumption would arise that the witness's testimony would be unfavorable. United States v. Di Re, 332 U.S. 581, 593, 68 S.Ct. 222, 92 L.Ed. 210 (1948). In an ex parte proceeding involving so fundamental a matter as the citizen's right to be secure in his home against arbitrary incursions of the police, the same principle should have some application, particularly when the government seeks to base probable cause on a mere pattern formed by otherwise innocent activity."

The best way in which to sum up this point is to quote from the concurring opinion of Judge Aldrich below:

> "I believe it would be bad practice, downgrade the government's obligation, and lead, at best, to difficult performance of their duties by United States Commissioners, if the government were permitted to cart in a barrow-load of what is hopefully pay dirt and leave it to the commissioner, or ultimately the court, to pan out a possible nugget. In this case out of three and a half printed pages only the one sentence referred to by Judge Woodbury regarding odor is affirmatively identified as being to the personal ob-

servation of a government investigator, and even he is not necessarily the affiant. I believe the initial duty should be upon the government to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic cover-all."

III. A LITERAL COMPLIANCE WITH THE TERMS OF THE FOURTH AMENDMENT AND RULE 41 IS NOT ONLY REQUIRED AS A MATTER OF LAW BUT IS CONSISTENT WITH GOOD PUBLIC POLICY. HEREIN, OF PART II OF GOVERNMENT'S BRIEF.

A. The History and Purpose of the Fourth Amendment

The right of a home owner or a property owner to a measure of personal privacy within the four walls of his house has been given due recognition for some time. Although a search of one's home may be desired for the purpose of ferreting out and seizing articles suspected of use in the commission of crime, it should be remembered that the owner in many cases is only a suspect and not yet a defendant in any criminal proceeding and that his right of privacy, like the rights of all other individuals, is not to be lightly regarded.

In *United States* v. *Lefkowitz*, 285 U.S. 452 52 S. Ct. 420 (1932) the Court said:

> "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. Byars v. U.S. 273 U.S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States*, 232 U.S. 383. *Agnello* v. *United States*, 269 U.S. 20, 32." (p. 464)

This concept was not new to the United States of America at the time the Bill of Rights was enacted. The

Fourth Amendment had its forerunner in the English Bill of Rights of 1689, and the reason for the rule has had expression in the writings of Coke and Blackstone.

The concept was given additional emphasis however at the time of the American Revolution, for among the many protests raised by the colonists toward the British King was their sincere and vehement opposition to the so-called Writs of Assistance. These were in the nature of general search warrants, unlimited as to time or object, and presumably deemed necessary by a beleaguered crown for the purpose of dampening the rising tide of an impending revolution.

The authorities are replete with historical explanations as to why the Fourth Amendment was phrased in such rigid language. See *Henry* v. *United States*, 361 U.S. 98 80 S.Ct. 168 (1959). It takes little imagination to picture what must have been the state of mind of the delegates to the constitutional convention when it met in Philadelphia in 1787. These men were still seared with the scars of a revolutionary war begun against their mother country in 1775 at great personal peril and risk to themselves. The indignities they had suffered under colonial rule had pushed them to the breaking point, and it was to throw off tyranny in all forms that the war had been conceived, not only the tyranny of peremptory search and seizure, but that of involuntary quartering and feeding of troops, of a controlled press, of onerous taxes, of closed ports, of insufficient home rule, and the like.

And it is most understandable that these men approved the new constitution for ratification only on condition that a Bill of personal liberties be drafted and appended to the constitution at the first opportunity so as to guard against any repetitions of these acts of the Crown by the now strengthened and somewhat distrusted Federal government.

It was in such a setting that the Fourth Amendment was adopted. In the words of Mr. Justice Frankfurter, "this provision of the Constitution . . . sought to guard against an abuse that more than any other single factor gave rise to American Independence . . ." *Harris* v. *United States*, 331 U.S. 145, 67 S.Ct. 1098 (1947).

B. An Affidavit Should not be Anonymous

Because of the Fourth Amendment, one thing was to be certain. No one's home was to be invaded in the name of law or government unless some individual was prepared to accept full responsibility by going before a proper magistrate and swearing under oath as to the existence of facts sufficient to constitute probable cause.

How chagrined would be the government if after a brutal entry turning up nothing, then to find that the individual responsible for the whole matter had relied solely on what others had told him and knew nothing about it himself.

In *Veeder* v. *United States*, 252 Fed. 414, (C.A. 7th 1918) the Court said:

> "If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law."

In the instant case the affiant could well know nothing, and those on whom he relied for information, being unnamed and unnumbered, could hardly be brought to account. The affidavit was anonymous. For all that the U.S. Commissioner would know, the affidavit could well

have been drawn by a swivel-chair government bureau head from the collective contents of his office files.

The respondent contends that this was not what was contemplated by the framers of the Fourth Amendment.

C. The Government Should not be Allowed to Keep its Witnesses under Wraps

True, a defendant can understand the reluctance of a governmental agency to disclose in advance of trial the names and identities of the parties to utter testimony against him. Nowhere in this case, either in the affidavit supporting the search warrant or in the recitation of overt acts supporting the conspiracy indictment, is there any certain indication as to where or from whom the government obtained its information leading to the issuance of the search warrant.

The defendant of course does not know whether the affidavit was loosely and sloppily drawn, or whether it was artfully drawn for the purpose of keeping the defendant uninformed until the date of trial. But the competitive aspects of trial practice with its adversary tactics on both sides should not be permitted to minimize the government's responsibilities in the pre-indictment stages of search and seizure.

D. Rebuttal to Part II of Government's Brief (pp. 18-24)

In Part II of its brief, the Government complains that the Court of Appeals had an "unduly negative attitude" in interpreting the affidavit (p. 18).

This of course may depend upon one's viewpoint. If one thinks that an attempt to satisfy the Fourth Amendment with a light brush should be sustained, then the lower Court's attitude was a negative one. But if one thinks that an affiant should meet the minimum literal

requirements of the Fourth Amendment and that Mazaka did not, then the lower Court's attitude in this case was a proper and constructive one.

The Government's Brief (p. 18) says the Court of Appeals imposed a burden on the affiant "to negate every inference which might defeat a finding of probable cause." The Government has read the decision in reverse. If the affiant had met the minimum requirements of the Fourth Amendment and Rule 41 he would have been home, and would not have been required to negate anything. The fault lies in the fact that he did not furnish the minimum.

The Government further argues that too strict a construction of affidavits will tend to discourage police applications for search warrants and will result in searches without warrants. The short answer to this proposition is that this was not a case where a search without a warrant would have been legal; but beyond this, the undersigned feels that the courts should not be influenced by the possibilities of such police reprisal. The courts should pass upon applications for search warrants with reference only to the meaning of the appropriate statutes and rules. Let the police agents be encouraged or discouraged as they choose.

Suffice to say, the Government's opinion as to how the Fourth Amendment should be applied is at odds with the Courts. The Government's brief reflects a position that the Fourth Amendment should not be applied too literally or strictly and that all doubts should be resolved in the favor of the Government. This Court seems to have held otherwise.

In *Gouled* v. *United States*, 255 U.S. 298, 41 S.Ct. 261 (1921) the Court said:

> "It has been repeatedly decided that these amendments should receive a liberal construction, so as

> to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly over-zealous executive officers."

In *Sgro* v. *United States*, 287 U.S. 206, 210, 53 S.Ct. 138 (1932) Chief Justice Hughes said:

> "The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual."

Although the Government has its fair share of earthly burdens, so too the people have theirs. And the purpose and intent of the Fourth Amendment should not be watered down or put in jeopardy by affidavits that either do not meet the test, or which do meet the test but fail to show that they do, lest individuals be deprived of the security and privacy of their homes and eventually their personal liberty.

CONCLUSION

It it respectfully submitted that the judgment of the Court of Appeals for the First Circuit, entered on November 26, 1963, be affirmed.

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